

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA and)	
THE STATE OF WISCONSIN,)	
)	
Plaintiffs,)	Civil Action No. 10-C-910
)	
v.)	Hon. William C. Griesbach
)	
NCR CORPORATION, et al.)	
)	
Defendants.)	
)	

PLAINTIFFS UNITED STATES' AND THE STATE OF WISCONSIN'S
MEMORANDUM IN OPPOSITION TO
DEFENDANT NCR'S MOTION FOR RECONSIDERATION

This Court properly denied the motion of Defendant NCR Corporation to supplement the Administrative Record. The one argument raised by NCR in its Motion for Reconsideration^{1/} was properly rejected by this Court.^{2/}

NCR argues that, in 2010, instead of evaluating the increased cost estimate for the remedy in an Explanation of Significant Difference (ESD), EPA and WDNR (the Agencies) should have issued an Amended Record of Decision (ROD) that re-evaluated the cost-effectiveness of the remedy. There is no basis for this claim.

^{1/} The "limited function" of a motion for reconsideration is "to correct manifest errors of law or fact or to present newly discovered evidence." Pearle Vision, Inc. v. Romm, 541 F.3d 751, 758 (7th Cir. 2008); Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987). NCR's motion does not identify any manifest error by this Court or present any newly discovered evidence.

^{2/} EPA's assurance that it will not implement the so-called 6/10 Rule renders moot NCR's argument that the rule makes EPA's and WDNR's remedy arbitrary and capricious. United States v. NCR Corp., No. 90-910, Decision and Order, Dkt. 498 (E.D. Wis. Aug. 30, 2012).

As the United States explained in Opposition Memorandum, the 2006 Basis of Design Report (BODR) increased the cost estimate for the original Record of Decision remedy to nearly \$580 million for Operable Units 2-5, and estimated the cost of the companies' proposed Optimized Remedy at \$390 million (in 2005 dollars). Dkt. 441 at 24-25. The PRPs generated subsequent cost estimate increases (to \$700.5 million overall) based on detailed cost projections using actual contract rates. Because their contractors had been engaged to perform the work, they could eliminate earlier cost uncertainties. The increased cost estimates were evaluated by the Agencies in a 2010 ESD and associated Criteria Analysis Memorandum. Id. at 25. The 2010 ESD compared the PRP-produced cost estimate in the 2006 BODR to the revised increased PRP-produced cost estimate, and reported by category the costs underestimated in the BODR. Id.

EPA's regulations, 40 C.F.R. § 300.435(c)(2)(i) & (ii), provide that, if differences adopted by EPA "significantly change, but do not fundamentally alter" the remedy selected in the ROD with respect to scope, performance, or cost, EPA may publish the change in an ESD. United States v. NCR Corp., et al., No. 10-910, Decision and Order, Dkt. 172 at 14 (E.D. Wis. July 5, 2011). "But under subsection (ii), an amendment to the ROD is required if the differences *do* 'fundamentally alter the basic features of the selected remedy.'" Id. "EPA is afforded substantial deference in construing its own regulations." Id., at 13.

The Agencies properly analyzed the 2010 increased cost estimate in an ESD rather than in an amended ROD. As this Court explained in its July 5, 2011, Decision and Order, the 62% cost projection increase is not necessarily exceptionally large in this case because it is "nearly within EPA's expected - 30% to + 50% accuracy range for the cost of a remedial action." Dkt. 404-4 at 15; United States v. NCR, July 5 Decision and Order at 14 (Dkt. 172). The difference in

projected cost was, as EPA explained, “significant, but not fundamental.” Dkt. 404-4 at 15.

This Court has held that “the government has a strong likelihood of succeeding in showing that it followed proper procedures” in publishing the increased cost projections in an ESD. United States v. NCR, July 5 Decision and Order, p. 15; see also United States v. Akzo Coatings, Inc., 949 F.2d 1409, 1430 (6th Cir. 1991) (upholding EPA decision to authorize pilot testing of alternative soil cleanup remedy in ESD); Marriott v. Simkins Industries, Inc., 929 F.Supp. 396, 404 (S.D. Fla. 1996) (greater than 50% difference between projected and actual amount of soil excavation did not even require an ESD in a private party cleanup).

As this Court’s prior review establishes, the Administrative Record supporting the Agencies’ 2010 ESD consists of only a handful of documents, and those documents fully explain the Agencies’ decision. The ESD, for example, fully explains the increased cost estimate for each cost category. Dkt. 404-4, pp. 12-15. The Agencies thoroughly described and documented the basis for the cost estimate increase in their Criteria Analysis Memorandum of February of 2010, referenced in the ESD. Dkt. 147-2. There is no need to supplement the administrative record on this point.

Finally, nothing will be gained by allowing NCR to supplement the Administrative Record with the testimony of Mr. Zelikson, who proposes only to offer his own legal opinions about whether the Agencies’ issuance of an ESD was consistent with EPA’s regulations. His testimony is an *amicus curiae* brief disguised as an expert opinion. It won’t be of any help. See e.g., Zelikson Report at 3 (Dkt. 501, Attachment, p. 3). His testimony is inadmissible anyway, because it addresses legal issues that are within the sole province of the Court to adjudicate. Roundy’s Inc. v. NLRB, 674 F.3d 638, 648 (7th Cir. 2012).

This Court properly denied NCR's motion.

Respectfully submitted,

For Plaintiff United States of America

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

Dated: September 17, 2012

s/ Sean Carman
RANDALL M. STONE
JEFFREY A. SPECTOR
KRISTIN M. FURRIE
SUMONA N. MAJUMDAR
SEAN CARMAN
MAYA S. ABELA
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Telephone: 202-514-1308
Facsimile: 202-616-6584
E-Mail: randall.stone@usdoj.gov
sean.carman@usdoj.gov

GREGORY J. HAANSTAD
Attorney for the United States, Acting
Under Authority Conferred by 28 U.S.C. § 515

SUSAN M. KNEPEL
Assistant United States Attorney
Office of the United States Attorney
517 E. Wisconsin Avenue, Room 530
Milwaukee, WI 53202

For the State of Wisconsin

Dated: September 17, 2012

s/ Cynthia R. Hirsch
CYNTHIA R. HIRSCH
Assistant Attorney General
Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-785
hirschcr@doj.state.wi.us

CERTIFICATE OF SERVICE

I, Sean Carman, an attorney, certify that on September 17, 2012, the foregoing Memorandum in Opposition to NCR's Motion for Reconsideration was filed electronically using the Court's ECF system and automatically served through the Court's ECF system on the following:

Mary Rose Alexander
Latham & Watkins LLP
mary.rose.alexander@lw.com

Thomas Armstrong
von Briesen & Roper SC
tarmstro@vonbriesen.com

Paul Bargren
Foley & Lardner LLP
pbargren@foley.com

Linda E. Benfield
Foley & Lardner LLP
lbenfield@foley.com

Dennis P. Birke
DeWitt Ross & Stevens SC
db@dewittross.com

Steven P. Bogart
Reinhart Boerner Van Deuren SC
sbogart@reinhartlaw.com

Michael P. Carlton
von Briesen & Roper SC
mcarlton@vonbriesen.com

Evan R. Chesler
Cravath Swaine & Moore LLP
echesler@cravath.com

Marc E. Davies
Greenberg Traurig LLP
daviesm@gtlaw.com

Brandon J. Evans
Hermes Law Ltd.
bje@hermeslawltd.com

S. Todd Farris
Friebert Finerty & St. John SC
stf@ffsj.com

Patrick J. Ferguson
Latham & Watkins LLP
patrick.ferguson@lw.com

Sandra C. Goldstein
Cravath Swaine & Moore LLP
sgoldstein@cravath.com

Thomas R. Gottshall
Haynsworth Sinkler Boyd PA
lgantt@hsblawfirm.com

Eric W. Ha
Sidley Austin LLP
cha@sidley.com

Scott W. Hansen
Reinhart Boerner Van Deuren SC
shansen@reinhartlaw.com

William H. Harbeck
Quarles & Brady LLP
william.harbeck@quarles.com

Michael L. Hermes
Hermes Law Ltd.
PERLINK"mailto:mlh@hermeslawltd.com"mlh@hermeslawltd.com

Cynthia R. Hirsch
Wisconsin Department of Justice
hirschcr@doj.state.wi.us

Caleb J. Holmes
Greenberg Traurig LLP
holmesc@gtlaw.com

Philip C. Hunsucker
Hunsucker Goodstein & Nelson PC
phunsucker@hgnlaw.com

Peter C. Karegeannes
Quarles & Brady LLP
peter.karegeannes@quarles.com

Gregory A. Krauss
Gregory Krauss pllc
gkrauss@krausspllc.com

Paul G. Kent
Stafford Rosenbaum LLP
pkent@staffordlaw.com

Ericka L. Krumrie
Hermes Law Ltd
elk@hermeslawltd.com

Linda R. Larson
Marten Law PLLC
llarson@martenlaw.com

Vanessa A. Lavelly
Cravath Swaine & Moore LLP
vlavelly@cravath.com

Susan E. Lovern
von Briesen & Roper SC

slovern@vonbriesen.com

Kevin J. Lyons
Davis & Kuelthau SC
klyons@dkattorneys.com

Karl S. Lytz
Latham & Watkins LLP
karl.lytz@lw.com

Meline G. MacCurdy
Marten Law
mmaccurdy@martenlaw.com

David G. Mandelbaum
Greenberg Traurig LLP
mandelbaumd@gtlaw.com

Bradley M. Marten
Marten Law
bmarten@martenlaw.com

Tara M. Mathison
Davis & Kuelthau SC
tmathison@dkattorneys.com

Darin P. McAtee
Cravath Swaine & Moore LLP
dmcatee@cravath.com

Stephen F. McKinney
Haynsworth Sinkler Boyd PA
smckinney@hsblawfirm.com

Heidi D. Melzer
Hermes Law Ltd.
hdm@hermeslawltd.com

Elizabeth K. Miles
Davis & Kuelthau SC
emiles@dkattorneys.com

Sabrina Mizrachi
Greenberg Traurig LLP
mizrachis@gtlaw.com

Monique M. Mooney
Greenberg Traurig LLP
mooneym@gtlaw.com

William J. Mulligan
Davis & Kuelthau SC
wmulligan@dkattorneys.com

Daniel C. Murray
Johnson & Bell Ltd.
murrayd@jbltd.com

Omid H. Nasab
Cravath Swaine & Moore LLP
onasab@cravath.com

Kelly J. Noyes
von Briesen & Roper SC

knoves@vonbriesen.com

Nancy K. Peterson
Quarles & Brady LLP
nancy.peterson@quarles.com

Thomas M. Phillips
Reinhart Boerner Van Deuren SC
tphillip@reinhartlaw.com

Ian A.J. Pitz
Michael Best & Friedrich LLP
iapitz@michaelbest.com

David A. Rabbino
Hunsucker Goodstein & Nelson PC
drabbino@hgnlaw.com

Joan Radovich
Sidley Austin LLP
jradovich@sidley.com

Ronald R. Ragatz
DeWitt Ross & Stevens SC
rrr@dewittross.com

Alexandra Reeve Givens
Cravath Swaine & Moore LLP
LINK"mailto:agivens@cravath.com"agivens@cravath.com

Kathleen L. Roach
Sidley Austin LLP
kroach@sidley.com

Megan A. Senatori
DeWitt Ross & Stevens SC
ms@dewittross.com

Adam B. Silverman
Greenberg Traurig LLP
silvermana@gtlaw.com

Sarah A. Slack
Foley & Lardner LLP
sslack@foley.com

Margaret R. Sobota
Sidley Austin LLP
msobota@sidley.com

Anthony S. Wachewicz, III
City of Green Bay
tonywa@ci.green-bay.wi.us

James P. Walsh
Appleton City Attorney
jim.walsh@appleton.org

Ted A. Warpinski
Friebert Finerty & St John SC
taw@ffsj.com

Ted Waskowski
Stafford Rosenbaum LLP
twaskowski@staffordlaw.com

Evan B. Westerfield
Sidley Austin LLP

evanwesterfield@sidley.com

Richard C. Yde
Stafford Rosenbaum LLP
ryde@staffordlaw.com

s/ Sean Carman
Sean Carman
Counsel for the United States